IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CENTRAL EXCISE & CUSTOMS GOLD CONTROL AP No 81 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

COMMISSIONER OF CENTRL EXCISE & CUSTOMS

Versus

BHARAT PAINTS & CHEMICAL INDUSTRIES.

Appearance:

1. CENTRAL EXCISE & CUSTOMS GOLD CONTROL AP No. 81 of 2002
   MR JITENDRA MALKAN for Petitioner No. 1
   MR PARESH M DAVE for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 01/12/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE B.J.SHETHNA)

The Commissioner of Central Excise and Customs, Vadodara has filed this reference under Section 35H(1) of the Central Excise Act, 1944 (for short "the Act") praying that the appellant-Tribunal be directed to refer the question of law that "Whether merely on use of words "intentionally evaded" in the Show Cause Notice, Tribunal is right in constructing that this notice is issued under proviso to Section 11A(1); even though the demand was raised within six month; and no charge of "...by reason of fraud, collusion, willful mis-statement, suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder....." was alleged."

From the impugned order dated 9.10.2000 passed by the CEGAT, it is clear that it had allowed the appeal No.E/2041-R/96-Bom filed by the present respondent i.e. Bharat Paints & Chemicals Industries, Vadodara, in view of its earlier order.

Last time i.e. on 4.11.2004 when this matter was placed before this court, Mr.Dave, learned counsel for the respondent submitted that in earlier case, Department had not challenged the order passed by the Tribunal, which has been relied upon by the Tribunal in the instant case. He had submitted that having accepted the earlier order passed by the Tribunal in favour of other assessee, the Department now cannot challenge the subsequent order passed by the Tribunal in favour of the present opponent. In case of Bharat Paints and Chemicals, the Tribunal passed an order reported in 2000(119) E.L.T. 145 (Tribunal) is still holding the field. This court has dismissed Tax Appeal No.253/04 on the ground that when the Department had accepted the judgment of the Tribunal in earlier case, then it cannot subsequently challenge the order before the Tribunal in a case based on earlier judgment. However, Mr.Malkan wanted time to take necessary instruction in the matter, therefore, the matter was adjourned. Accordingly, it is placed on our board today.

It is not in dispute that the impugned order dated 23.10.2001 at page 29 passed by the CEGAT is based on its earlier order, which is accepted by the Department. Having not challenged the previous order, the Department cannot now challenge the subsequent order by way of this reference.

In view of the above discussion, this reference application is rejected. Rule is discharged. No order as to costs.

(B.J.Shethna, J.)

(Sharad D. Dave, J.)

*Pvv